THE TITULAR ROMAN CATHOLIC BISHOP OF MELAKA-JOHOR v. PENTADBIR TANAH MELAKA TENGAH & ANOR

HIGH COURT MALAYA, MELAKA
VAZEER ALAM MYDIN MEERA J
[ORIGINATING MOTION NO: 25-01-02-2016]
9 MARCH 2017

ADMINISTRATIVE LAW: *Judicial review – Application for – Certiorari – Acquisition of land – Gazette notifications – Lapse of – Re-gazette notifications to acquire same portion of land – Whether valid – Whether acquisition proceedings could be revived and continued by re-issuing declaration under s. 8(1) of the Land Acquisition Act 1960 and publishing it in gazette afresh – Whether acquisition process should start afresh – Land Acquisition Act 1960, ss. 3(1), 8(4) & 11*

The applicant was the registered owner of a piece of land ('the land'). Arena Kencana, a private limited company proposed to develop lands situated adjacent to the land into a mixed development ('project lands'). Arena Kencana therefore applied to acquire 0.9949 hectares of the land. The application was then forwarded to the Unit Perancang Ekonomi Negeri Melaka ('UPENM') by the first respondent as required under s. 3A of the Land Acquisition Act 1960 ('the LAA'). The acquisition application was then escalated to the State Authority *ie* the Majlis Mesyuarat Kerajaan Negeri Melaka ('MMKM'). MMKM approved the acquisition application under s. 3(1) of the LAA. Subsequently, amongst others, a Borang D dated 6 February 2013 issued under s. 8 of the LAA was published in the gazette dated 14 February 2013 ('the first gazette notification'). Following the first gazette notification, the first respondent issued to the applicant Borang E under s. 10 of the LAA and Borang F under s. 11 of the LAA, both dated 25 March 2013, notifying the applicant of the land acquisition inquiry. The first inquiry was held on 16 April 2013 and the second inquiry was held on 10 May 2013. However, the first respondent did not conclude the inquiry. The applicant opposed the acquisition and requested to stay all acquisition proceedings pending the disposal of the applicant's application to set aside the acquisition *vide* an originating summons at the High Court. The High Court dismissed the originating summons and the applicant's subsequent appeal to the Court of Appeal was also struck out on the grounds that the statutory time bar of two years provided in s. 8(4) of the LAA for the first respondent to hand down the compensation award had set in on 15 February 2015. As the first gazette notification had lapsed on 15 February 2015 and the acquisition proceedings had ended which, thus, rendered the appeal academic. In the meantime, the first respondent re-gazetted Borang D under s. 8 of the LAA to acquire the same portion of the land. The fresh Borang D was re-gazetted on 22 October 2015 ('the second gazette notification'). Since Arena Kencana had in the meantime gone into financial distress, the High Court approved a scheme of arrangement pursuant to s. 176(1) of the

Companies Act 1965. Pursuant to the scheme of arrangement, the adjoining project lands were sold and transferred to Redfield Consortium Sdn Bhd ('Redfield'). The first respondent then published a correction in gazette dated 5 November 2015 *ie* after the publication of the second gazette notification, wherein the applicant for the land acquisition was changed to Redfield. Following the second gazette notification, the first respondent re-issued a fresh Borang E dated 13 November 2015 and Borang F dated 24 November 2015 to carry on the land acquisition inquiry. Therefore, the applicant had pursuant to O. 53 Rules of Court 2012 ('ROC') sought a declaration that the decision of the first respondent to acquire part of the land was invalid in law, and accordingly, the applicant sought an order of *certiorari* to quash the decision of the first respondent. The respondents, on the other hand, raised the issue of *res judicata,* in that, the issues raised by the applicant in the present judicial review application had been raised and adjudicated upon by the High Court in the applicant's originating summons, the appeal of which decision was struck out by the Court of Appeal. The issue that arose for determination, *inter alia*, was whether the respondents could revive and continue with the proceedings by re-issuing the declaration under s. 8(1) and publishing it in the *gazette* afresh; or should it be by way of an entirely fresh acquisition process.

Held (allowing applicant's application with costs):

(1) The respondents could not revive the lapsed acquisition proceedings by re-issuing the declaration under s. 8(1) and publishing it in the *gazette* afresh. The Government's purpose and intent in moving the Amend Bill to include s. 8(4) to the LAA was to overcome the mischief of inordinate delay in completing the acquisition process and payment of the award of compensation, which had led to injustice to landowners whose lands had been acquired. If the respondents were allowed to revive the lapsed acquisition by re-issuing the s. 8(1) declaration after the expiry of the earlier one, it would definitely not be in consonant with the intent of Parliament to bring about the speedy determination of the inquiry within a period of two years. In such an event, the mischief that the Legislature sought to remedy would not be corrected. If the contention of the Federal Counsel were upheld, it would mean that the respondents could keep on re-issuing the declaration in continuation after each expiry and go on *ad infinitum*. This is certainly not the intent of Parliament in enacting s. 8(4) of the LAA. Therefore, in interpreting the provision as a whole and when the overall scheme of the legislation is considered, it is quite obvious that once the declaration under s. 8(1) has lapsed as provided in s. 8(4), the entire acquisition proceedings come to an end. If the State Authority was still desirous of acquiring the land, it would have to start the process afresh right from the beginning, *ie* from s. 3 of the LAA onwards. (paras 21, 32 & 36)

(2) The law envisages that the landowner whose land is acquired is adequately compensated. There was no evidence that the respondents intended to do a fresh market valuation of the land to be acquired. This also meant that the first respondent would in all probability be keeping to the market valuation done sometime in 2012/2013 in assessing the compensation to be awarded. A period of four years had lapsed since the acquisition. If the respondents were allowed to continue with the acquisition in the manner they have chosen, an award of compensation based on a market valuation done in 2012/2013 might not truly reflect the current market value. Thus, the applicant might not stand to be awarded fair and adequate compensation reflecting the market value. This is clearly not the intention of the Legislature in introducing s. 8(4) of the LAA. Therefore, the respondents should start the acquisition process afresh, so that the applicant stood to be compensated at market value and was provided all the statutory rights and protection under the law. (paras 37 & 39)

(3) Section 8(5) of the LAA makes it abundantly clear that when the s. 8(1) declaration lapses by effluxion of time pursuant to s. 8(4), the provisions of s. 35(2), (3) and (4) of the LAA would apply with necessary modifications. Section 35(2) of the LAA provides for compensation to be paid to the landowner when the State Authority withdraws from any acquisition under s. 35(1). If the same provisions as regards compensation for withdrawal from the acquisition by the State Authority under s. 35(1) apply to situations where the declaration has lapsed under s. 8(4), then it could only mean one thing and that is in both cases the entire land acquisition process had come to an end. Otherwise, it does not make any sense to allow for compensation to be paid to the landowner in accordance to s. 35(2). (para 40)

(4) The principles of *res judicata* and/or estoppel being equitable in nature, should not be applied in this case, as the issues raised in the earlier case had not been determined with finality by the Court of Appeal because of the failure of the respondents' counsel to make full and frank disclosure that they intended to proceed with the acquisition by re-issuing the s. 8(1) declaration. In the circumstances, it would be inequitable to allow the respondents to rely on *res judicata* and/or issue estoppel, as the application of these principles would lead to an unjust result and would not accord with good conscience. As such, the doctrine of *res judicata* and/or issue estoppel was inapplicable to bar the applicant from raising issues similar to those raised in the first OS. (para 56)

(5) It is trite law that the High Court when hearing an application for *certiorari* does not sit in its appellate jurisdiction but merely performs its supervisory jurisdiction. On the facts, the decision of the respondents to reissue and republish the s. 8(1) declaration suffered from the infirmities of illegality and procedural impropriety that warranting curial intervention. (paras 64 & 67)

Case(s) referred to:

Abdul Majeed Sahib v. District Collector AIR 1997 SC 2130 ***(refd)***

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***

Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd [1920] 28 CLR 129 ***(refd)***

Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] KB 223 ***(refd)***

Booi Kim Lee v. YB Menteri Sumber Manusia Malaysia & Anor [1999] 4 CLJ 121 HC ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

Chemfert Sdn Bhd & Anor v. Lim Hua [2010] 7 CLJ 491 CA ***(refd)***

Chenna Byrappa v. State of Karnataka and Others (2006) Indlaw KAR 536 ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***

Council of Civil Services Unions & Ors v. Minister of Civil Service [1985] 1 AC 374 ***(refd)***

Devji Keshavji v. Dahibai Bhailal Shah AIR 1971 Bom 285 ***(refd)***

Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor [2014] 8 CLJ 821 FC ***(refd)***

Jerry WA Dusing & Anor v. Majlis Agama Islam Wilayah Persekutuan (MAIWP) & Ors [2017] 1 CLJ 133 CA ***(refd)***

Joseph Paulus Lantip & Ors v. Unilever PLC [2012] 7 CLJ 693 FC ***(refd)***

Krishnan v. Vijayaraghavan 1977 Ker LT 1013 ***(refd)***

Lam Eng Rubber Factory (M) Sdn Bhd v. Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor [2005] 2 CLJ 157 CA ***(refd)***

M Sentivelu R Marimuthu v. Public Services Commission Malaysia & Anor [2005] 3 CLJ 778 CA ***(refd)***

Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal [2016] 4 CLJ 12 FC ***(refd)***

Mariyappa and Others Versus State of Karnataka and Others [1998] 3 MLJ 34 ***(refd)***

Mat Shuhaimi Shafiei v. Kerajaan Malaysia [2017] 1 CLJ 404 CA ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 2 CLJ 177 FC ***(refd)***

Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***

Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Mohd Shah Daud v. Pentadbir Tanah dan Jajahan Kota Bharu [2016] 6 CLJ 806 CA ***(refd)***

Naganna (Deceased) By L.Rs v. State of Karnataka And Others ILR 1998 KAR 3503 ***(refd)***

Ng Hee Thong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Nokes v. Doncaster Amalgamated Collieries [1940] AC 1014 ***(refd)***

Nothman v. Barnet Council [1978] 1 WLR 220 ***(refd)***

Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***

Panglima Tentera Laut Diraja Malaysia & Ors v. Simathari Somenaidu [2017] 3 CLJ 129 FC ***(refd)***

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee [1983] 1 LNS 14 FC ***(refd)***

Pengarah Tanah Dan Galian Negeri Kedah & Anor v. Emico Development Sdn Bhd [2000] 1 CLJ 86 CA ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Seaford Court Estates Ltd v. Asher [1949] 2 KB 481 ***(refd)***

Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors [2006] 1 CLJ 41 CA ***(refd)***

Straits Credit Sdn Bhd v. Pentadbir Tanah Daerah, Wilayah Persekutuan Kuala Lumpur [1994] 2 CLJ 855 HC ***(refd)***
Syed Mubarak Syed Ahmad v. Majlis Peguam Malaysia [2000] 3 CLJ 659 CA ***(refd)***
Tanalachimy Thoraisamy & Ors v. Jayapalasingam Kandiah Yong Yoon Shing & Anor [2014] 1 LNS 340 CA ***(refd)***
Tetuan Kumar Jaspal Quah & Aishah v. Far Legion Sdn Bhd & Anor [2007] 3 CLJ 230 CA ***(refd)***
Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram [2000] 4 CLJ 870 FC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 176(1)
Interpretation Acts 1948 and 1967, s. 17A
Land Acquisition Act 1960, ss. 3(1)(b), (3), (4), 3A(1)(b), (c), 4(1), (3), (4), 8(1), (4), (5), 10, 11, 35(1), (2), (3), (4), First Schedule para 1(1)
Legal Profession (Practice and Etiquette) Rules 1978, rr. 3(a), (b)(ii), 27
Rules of Court 2012, O. 53 r. 2

Land Acquisition Act 1894 [India], s. 11A(1)

Other source(s) referred to:
Maxwell on the Interpretation of Statutes, 7th ed

For the applicant - J Amardas; M/s KP Ng & Amardas
For the respondents - Yusliza Awal; Legal Advisor, Melaka

Reported by Sandra Gabriel

JUDGMENT

Vazeer Alam Mydin Meera J:

[1] This is an application by the applicant, pursuant to O. 53 of the Rules of Court 2012 ("ROC") for a declaration that the decision of the first respondent to acquire part of the land known as Lot 383, GRN 22816, Mukim Tanjung Minyak, Daerah Melaka Tengah ("the land") *vide* Gazette BTH No. 546, dated 22 October 2015 and BTH No. 586 dated 5 November 2015 is invalid in law, and accordingly, the applicant prays for an order of *certiorari* to quash the said decision of the first respondent to acquire the portion of the land and seeks consequential relief as prayed in encl. 1.

[2] The grounds of the application are as stated in the statement filed pursuant to O. 53 r. 2 of the ROC (encl. 3).

[3] The applicant is the registered owner of the land. Arena Kencana, a private limited company proposing to develop lands situated adjacent to the land into a mixed development known as the Malaysia China Light Industrial City ("the project"), had *vide* Borang 1 Kaedah-Kaedah Pengambilan Tanah 1998 dated 3 January 2012 applied to acquire 0.9949 hectares (2.458 acres) of the land for the purposes of drainage reserve serving the proposed development. And for this purpose, Arena Kencana, as the applicant for the land, had deposited the sum of RM412,000 together with the requisite fee of RM1,000 with the first respondent. The sum of

RM412,000 is equivalent to 125% of the market value of the portion of the land to be acquired. This was in compliance of the requirements of s. 3 of the Land Acquisition Act 1960 ("LAA").

[4] The application was then forwarded to the Unit Perancang Ekonomi Negeri Melaka ("UPENM") by the first respondent as required under s. 3A of the LAA. The UPENM then issued the notice in borang 3 (kaedah 6) of the Kaedah-Kaedah Pengambilan Tanah 1998 (notis rundingan) dated 26 March 2012 to Arena Kencana, to submit the "laporan rundingan dengan tuan tanah berdaftar" within 30 days of receipt of the notice.

[5] Thereafter, UPENM issued the borang 4 (kaedah 7) of the Kaedah-Kaedah Pengambilan Tanah 1998 dated 6 August 2012 to the Jawatankuasa Khas Pengambilan Tanah. The acquisition application was then escalated to the State Authority ie, the Majlis Mesyuarat Kerajaan Negeri Melaka ("MMKM") for its consideration and approval. The MMKM at its meeting held on 12 December 2012 approved the acquisition application under s. 3(1)(b) of the Land Acquisition Act 1960 ("the LAA").

[6] Thereafter, the borang 4 dated 14 January 2013 issued under s. 4 of the LAA was published in the *Warta Kerajaan Negeri Melaka vide* Gazette No. 145 dated 31 January 2013. Subsequently, the borang D dated 6 February 2013 issued under s. 8 of the LAA was published in the *Warta Kerajaan Negeri Melaka vide* Gazette No. 179 dated 14 February 2013 ("the first gazette notification").

[7] Following the first gazette notification, the first respondent issued to the applicant, as the landowner, the borang E under s. 10 of the LAA and the borang F under s. 11 of the LAA, both dated 25 March 2013, notifying the applicant of the land acquisition inquiry. The first inquiry was held on 16 April 2013 and the second on 10 May 2013. However, the first respondent did not conclude the inquiry and issue the compensation award primarily because of the representations contained in the applicant's solicitor's letter dated 10 May 2013. The applicant was opposed to the acquisition and had requested *via* his solicitors to stay all acquisition proceedings pending the disposal of the applicant's application to set aside the acquisition *vide* Originating Summons No. 24NCVC-180-5-2013 ("the first OS") by the Malacca High Court. The first respondent stayed all further proceedings of its own accord.

[8] The Malacca High Court had dismissed the first OS with cost of RM5,000 on 15 July 2014. The applicant appealed that decision to the Court of Appeal. The applicant in his affidavit states that at the date of hearing of the appeal on 22 April 2015 learned Senior Federal Counsel appearing for the respondents informed the court that:

(a) the statutory time bar of two years provided in s. 8(4) of the LAA for the first respondent to hand down the compensation award had set in on 15 February 2015; and

(b) as such the first gazette notification dated 14 February 2013 had lapsed on 15 February 2015 and the acquisition proceedings had ended.

[9] Wherefore, the learned Senior Federal Counsel urged the Court of Appeal to strike out the appeal on the grounds that it had been overtaken by events and rendered academic. The learned Senior Federal Counsel further informed the Court of Appeal that since the time provided under s. 8(4) of the LAA had lapsed, the land to be acquired had reverted to the applicant and the reliefs sought by the applicant in the first OS and the appeal were superfluous. The applicant states that based on the learned Senior Federal Counsel's submissions, the Court of Appeal did not proceed to hear the appeal on its merits and struck out the appeal. The applicant states that the learned Senior Federal Counsel did not inform the Court of Appeal, nor the applicant's counsel, that the respondents nevertheless intended to revive the acquisition process by reissuing a fresh borang D under s. 8 of the LAA and re-publishing it in the *Government Gazette*. These averments as to what transpired at the Court of Appeal are not controverted or refuted by the respondents.

[10] The first respondent sent an application to the Pejabat Pengarah Tanah Dan Galian Negeri Melaka ("PTGM") for the re-gazetting of the borang D. PTGM *vide* letter dated 5 October 2015 informed that the MMKN at its meeting held on 9 September 2015 had approved the first respondent's application to reissue and re-gazette the borang D under s. 8 of the LAA to acquire the same portion of the applicant's land for drainage reserve. The fresh borang D was re-gazetted in the *Warta Kerajaan Negeri Melaka* No. 546 dated 22 October 2015 ("the second gazette notification").

[11] Arena Kencana had in the meantime gone into financial distress wherein receivers and managers were appointed and court's protection was sought under s. 176 of the Companies Act 1965. The Kuala Lumpur High Court had *vide* order dated 4 January 2012 approved a scheme of arrangement pursuant to s. 176(1) of the Companies Act 1965 wherein as part of the scheme of arrangement the adjoining project lands were sold and transferred to Redfield Consortium Sdn Bhd ("Redfield") on 28 June 2012. Ostensibly Redfield is now the developer of the project. The first respondent then published a correction in Gazette No. 586 dated 5 November 2015, ie, after the publication of the second gazette notification, wherein the applicant for the land acquisition was changed to Redfield.

[12] Following the second gazette notification, the first respondent re-issued a fresh borang E dated 13 November 2015 and borang F dated 24 November 2015 to carry on the land acquisition inquiry. The applicant upon receipt of these borang E and F notices filed the present originating motion for judicial review of these decisions of the respondents. The first respondent has suspended further proceedings pending the resolution and disposal of this originating motion.

[13] The applicant's contention is that by virtue of the statutory time limit in s. 8(4) of the LAA, the declaration contained in the first gazette notification had lapsed and as a result the entire acquisition proceedings shall terminate and be of no effect. Therefore, the applicant argues that the revival of the acquisition proceedings by re-gazetting the borang D under s. 8(1) of the LAA is contrary to law and is void. The applicant states that if the respondents were still desirous of acquiring a part of the land, then the entire acquisition process beginning from the initial requirements in s. 3 of the LAA would have to be followed all over again. The respondents on the other hand, contend that they do not have to restart the entire acquisition proceedings after the declaration in the first gazette notification had lapsed and that it is well within the law to re-gazette the borang D pursuant to s. 8(1) of the LAA and proceed therefrom. The respondents, have also raised the issue of *res judicata* in that the issues raised by the applicant in this judicial review has been raised and adjudicated upon by the Malacca High Court in the applicant's first application *vide* first OS, the appeal of which decision was struck out by the Court of Appeal. The applicant, on the other hand, argues that *res judicata* does not apply under the factual circumstances of the case.

[14] I will deal with the first issue. A good starting point will be to look at s. 8 of the LAA that reads:

> (1) When the State Authority decides that any of the lands referred to in section 7 are needed for any of the purposes referred to in section 3, a declaration in Form D shall be published in the *gazette*.
>
> (2) A copy of the list of lands referred to in paragraph 7(b), amended, if necessary, in accordance with the decision of the State Authority, shall be included as a schedule to the declaration in Form D.
>
> (3) A declaration in Form D shall be conclusive evidence that all the scheduled land referred to therein is needed for the purpose specified therein.
>
> (4) A declaration under subsection (1) shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the *gazette* in so far as it relates to any land or part of any land in respect of which the Land Administrator has not made an award under subsection 14(1) within the said period of two years, and, accordingly, all proceedings already taken or being taken in consequence of such declaration in respect of such land or such part of the land shall terminate and be of no effect.
>
> (5) Where the declaration under subsection (1) has lapsed, subsections 35(2), (3) and (4) shall apply with the necessary modifications.

[15] Sub-section 8(4) of the LAA was inserted *via* Act A575 and came into effect on 20 January 1984. Prior to that, the statute did not prescribe a time limit for the Land Administrator to conclude the inquiry and make an award for compensation. In the years prior to the amendment, there were many instances where Land Administrators took years to conclude the land acquisition proceedings.

[16] This mischief was recognised by the Federal Court in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* [1983] 1 LNS 14; [1983] 2 MLJ 35. In that case, after the s. 8(1) of the LAA declaration was made, nothing was done by the Land Administrator for more than seven years and Salleh Abas CJM (as he then was) in striking down the impugned acquisition proceedings as illegal said that:

> The next relevant issue is the injustice caused to the landowner by the delay in holding the inquiry and the making of the award.
>
> ...
>
> If the delay in holding the enquiry in this case is allowed, paragraph 1(1) of the First Schedule would become an engine or a purveyor of injustice. Surely this was not the intention of the legislature. By providing no time limit within which the Collector should hold an inquiry the legislature leaves the discretion in the matter to the Collector, but it is certainly not its intention that the Collector shall be free to use it at any time he chooses to inquire at the expense of the land owner or regardless of his right. As demonstrated in this case, the Collector's delay in holding the inquiry under section 10 of the Act seven years after the declaration of acquisition resulting in an inadequate compensation to the respondent brings the inquiry and the award outside the purview and scope of the Act. Such delay tantamounts to an abuse of power and renders the inquiry and subsequent proceedings null and void.

[17] To address such mischief, the law was amended to impose a set time period of two years for the inquiry to be completed. The legislative intent and purpose in introducing this amendment to the LAA is very apparent from the speech of the Minister when tabling the Amendment Bill in Parliament for the second reading. The Hansard quotes the Minister as saying this:

> Pada kali ini keseluruhan Akta ini telah dikaji semula secara terperinci. Perkara-perkara dasar dan prinsip diberi perhatian yang khusus dengan tujuan untuk membolehkan tuan-tuan tanah yang terlibat mendapat keadilan yang lebih sempurna dari berbagai sudut. Di samping itu pindaan-pindaan yang dicadangan juga memberi jaminan yang konkrit bahawa sesuatu pengambilan balik tanah itu akan diselesaikan dalam jangka masa yang ditetapkan.
>
> ...
>
> Apabila sesuatu tanah yang hendak diambil diisytiharkan dibawah Seskyen 8 Akta Pengambilan Balik Tanah, maka pengambilannya hendaklah diselesaikan dalam tempoh 2 tahun, jika tidak perisytiharannya akan terbatal.
>
> ...
>
> Pada masa ini had masa tidak diperuntukkan di bawah Akta tersebut. Pindaan ini terpaksa dibuat oleh kerana pada masa yang lalu ada Pemunggut-pemunggut Hasil Tanah telah mengambil berbulan-bulan malah bertahun ...

[18] This legislative purpose was recognised by the Court of Appeal in the majority decision of Gopal Sri Ram JCA (later FCJ) and Siti Norma Yaakob JCA (later CJM) in *Pengarah Tanah Dan Galian Negeri Kedah & Anor v. Emico Development Sdn Bhd* [2000] 1 CLJ 86; [2000] 1 MLJ 257 at p. 93 (CLJ); p. 263 (MLJ) in the following terms:

> Having regard to the state of the common law *when the fourth subsection was introduced by amendment, it is clear that Parliament intended to place a definite time limit within which the state authority must act to effect an acquisition of land. The legislative purpose was obviously to put an end to uncertainty and protracted litigation resulting from long delays between the publication of a declaration in the gazette and the making of an award of compensation*. The position today is that a declaration under s 8(1) lapses and becomes ineffective by effluxion of time if no award is made within two years from the date of its publication in the *gazette*. (emphasis added)

[19] The legislative purpose in enacting s. 8(4) of the LAA was once again reiterated by the Court of Appeal in the recent case of *Mohd Shah Daud v. Pentadbir Tanah dan Jajahan Kota Bharu* [2016] 6 CLJ 806; [2016] 3 AMR 827 where Mary Lim Thiam Suan JCA speaking for the court held that:

> Where a person has been deprived of his property not out of his own free choice, there must be adequate compensation paid for that property. Generally, the adequacy of compensation is measured by reference to the market value of the property at the time of the acquisition. The further away one moves from that point of reference and determination, the closer one gets to concerns on the lawfulness of such acquisitions as the market values will differ over time. Hence, the substantial amendments to Act 486 *vide* the Land Acquisition (Amendment) Act 1997 (Act A999) which came into force with effect from March 1, 1998, to ensure that the hearing and making of acquisition awards are completed within a strict time frame of two years, failing which the acquisition will lapse.

[20] Now, having set out the legislative purpose and intent of Parliament in enacting s. 8(4) of the LAA let me consider the effect of s. 8(4) in law as to the status of the affected proceedings. It is common ground between parties that the first gazette notification has lapsed by effluxion of time and the acquisition proceedings has terminated under s. 8(4). The respondents are desirous of still acquiring that portion of the land. The question is whether the respondents can revive and continue with the proceedings by re-issuing the declaration under s. 8(1) and publishing it in the *gazette* afresh; or should it be by way of an entirely fresh acquisition process.

[21] My considered view is that the respondents cannot revive the lapsed acquisition proceedings by re-issuing the declaration under s. 8(1) and publishing it in the *gazette* afresh. And I say so for the following reasons. Section 8(4) of the LAA reads:

> (4) A declaration under subsection (1) shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the *gazette* in so far as it relates to any land or part of any land in respect of which the Land Administrator has not made an award under subsection

> 14(1) within the said period of two years, and, accordingly, all proceedings already taken or being taken in consequence of such declaration in respect of such land or such part of the land shall terminate and be of no effect.

[22] The learned Federal Counsel who appears for the respondents argues that a literal construction of the words in s. 8(4) means that only proceedings that have been taken or are in the process of being taken after the publication of the s. 8(1) declaration comes to an end and not the proceedings prior to that. In arguing for that interpretation, the learned Federal Counsel has taken the words "all proceedings already taken or being taken in consequence of such declaration" to refer to the matters done in consequence to such declaration and not before. However, learned counsel for the applicant argues that the words "all proceedings already taken" cannot be restricted only to matters done subsequent to the s. 8(1) declaration and that it must necessarily be taken to refer to the entire proceedings beginning from the requirements of s. 3 of the LAA and onwards. Learned counsel for the applicant further submits that the word "or" implies that it is disjunctive, and thus there are two limbs to s. 8(4), ie, (i) all proceedings taken prior to the issuance of the s. 8(4) declaration, and (ii) all proceedings being taken in consequence of such declaration. Hence, learned counsel for the applicant submits that the first limb, ie, "all proceedings taken" could only mean that the entire proceedings taken before the issuance of the s. 8(1) declaration shall terminate and be of no effect. Consequently, counsel argues that the acquisition proceedings have to be restarted afresh if the State Authority was still desirous of acquiring the said land.

[23] In support of this contention, learned counsel for the applicant has referred to several Indian cases. In *Naganna (Deceased) By L.Rs v. State of Karnataka And Others* ILR 1998 KAR 3503, the time prescribed in s. 11A of the Indian Land Acquisition Act, which is similar to s. 8 of the LAA but worded differently, was discussed and in respect of a lapsed declaration the court held as follows:

> 11. Section 11A of the Acquisition Act mandates the Land Acquisition Officer to make an award under Section 11 within a period of two years from the date of the declaration and further provides that if no award is made within that period, the entire proceedings for acquisition of the land would lapse. It is relevant to point out that Section 11A of the Acquisition Act not only casts an obligation on the Land Acquisition Officer to make an award under Section 11 within a period of two years from the date of the declaration, but also provides for the consequences, if such declaration is not made. As observed by me earlier, *the consequences of not making an award is that the entire proceedings for acquisition of the land would lapse. Therefore, in my view, the provisions contained in Section 11A of the Acquisition Act are mandatory in nature. The consequences of not passing the award within the time prescribed is that statutorily acquisition proceedings stand lapsed*. Therefore, since there is no dispute and there cannot be any dispute that the award was not passed within a period of two years from the date of the declaration made under sub-section (1) of Section 19 of the Act, I am of the view that the entire acquisition proceedings stood lapsed. In my view, I am also

supported by the declaration of the Supreme Court in the case of *Abdul Majeed Sahib*, *supra*, wherein at paragraph 8 of the said judgment, the Supreme Court has observed as follows:

> *Section 11A was brought on statute by Amendment Act 68 of 1984. It was notorious that the State, after publication of declaration under Section 6 went on delaying for years, to pass the awards putting obstruction to the owner of the land for enjoyment; resultantly, loss and undue disadvantage ensued to the owner of the land. To mitigate such hardship, the Parliament introduced Section 11A* and directed the Land Acquisition Officer to make the award within two years from the date of publication of last of the steps under Section 6(2) publishing the declaration under Section 6. As a consequence, *the Land Acquisition Officer is statutorily under an obligation, at the pain of invalidation of the acquisition itself, to make the award within two years* unless it falls within one of the provisos or the explanation added thereto. In this case, neither the proviso nor the Explanation stands attracted to the facts. Consequently, *since the Land Acquisition Officer did not make the award within two years from the date of the declaration, viz., June 17, 1988, the entire acquisition shall stand lapsed.* (emphasis added)

[12] In the light of the discussion made above, *I am of the view that the entire acquisition proceedings statutorily stood lapsed for the default in not passing the award within the time prescribed.*

[24] Similarly in *Chenna Byrappa v. State of Karnataka and Others* (2006) Indlaw KAR 536, Mohan Shantanagoudar J at para. 5 said:

> … Section 11-A of the Land Acquisition Act makes it clear that if no award is made within a period of two years from the date of publication of final notification, the entire proceedings of the acquisition of land shall lapse. As aforesaid, in this case, the final notification dated 15th December 1983 is published in the official *gazette* on 27th March 1984. As the award is not passed even after 20 years, the acquisition proceedings pertaining to the petitioned property will automatically lapse. Hence, the following order is made:
>
> The Notification in question *vide* Annexure 'A' to the petition, pertaining to the petitioned property bearing Survey No. 102/1, situated at Yentiganahalli village, Kasaba Hobli, Nelamangala Taluk, stands quashed. It is open for the respondents to initiate fresh acquisition proceedings in accordance with law, if need be.

[25] The Indian Supreme Court in *Mariyappa and Others Versus State of Karnataka and Others* [1998] 3 MLJ 34 (SC) in construing the applicability of s. 11A of the Indian Land Acquisition Act to the Karnataka Acquisition of Land for House Sites Act had held that:

> Admittedly, the prescribed period under Sec. 11-A has elapsed and it is stated, that even now, the award is not passed. Therefore, it is clear that the conditions of Sec. 11-A are violated, and accordingly, the entire land acquisition proceedings including the notifications under Secs. 3(1) and 3(4) of the Karnataka Act, 1972 lapse. We declare accordingly.

[26] From these cases, it is apparent that the Indian courts have construed the effect of their s. 11A is to bring about the termination of the entire land acquisition upon expiry of the two year time limit. Section 11A(1) of the Indian Land Acquisition Act 1894 reads:

> (1) The Collector shall make an award under section 11 within a period of two years from the date of the publication of the declaration and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse: Provided that in a case where the said declaration has been published before the commencement of the Land Acquisition (Amendment) Act, 1984 (68 of 1984), the award shall be made within a period of two years from such commencement.

[27] Though, the words of s. 11A(1) of the Indian Act are slightly different from that of s. 8(4) of the LAA, I find that the import, meaning and intent of both the provisions are the same, ie, that land acquisition is to be concluded expeditiously and once the declaration lapses by effluxion of time, which incidentally is also two years in the Indian statute, the entire land acquisition proceedings, including the initial notifications terminates. In the *Naganna* case the learned judge quotes the decision of the Indian Supreme Court's decision in *Abdul Majeed Sahib v. District Collector* (AIR 1997 SC 2130) where the court said that s. 11A(1) of the Indian Land Acquisition Act was introduced by Parliament in 1984 to alleviate the injustice and hardship caused to landowners from the prevalence of inordinate delay on the part of acquiring authorities to pass down the award. This is the very same mischief that our Parliament sought to remedy in introducing s. 8(4) of the LAA in 1984. Thus, I find these Indian decisions to be highly persuasive.

[28] In light of the rival contentions put forth by learned counsel for the parties, it falls on me to consider which of the two interpretations of s. 8(4) best conveys the intention of the Legislature in promulgating that piece of legislation. Let me now consider the arguments of parties on this issue. The dominant purpose in construing a statute is to ascertain the purpose and intention of the Legislature. Fundamental to this basic tenet is the understanding that Parliament speaks its mind by use of correct words and expression. Thus, unless there is ambiguity, the general rule is that the court should adopt a literal approach to construction. However, in the present case when the literal approach is taken, there does seem to be some ambiguity in construing the import and meaning of s. 8(4) of the LAA, as can be seen in the opposing contentions of counsel for the applicant and respondents. Thus, I have taken the next best approach, the purposive approach, ie, the construction of the provision that will best promote the general legislative purpose. See: *Nothman v. Barnet Council* [1978] 1 WLR 220; *Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram* [2000] 4 CLJ 870 FC.

[29] Suriyadi Halim Omar JCA (now FCJ) in *Tetuan Kumar Jaspal Quah & Aishah v. Far Legion Sdn Bhd & Anor* [2007] 3 CLJ 230; [2007] 3 MLJ 305 CA, having referred to Maxwell on the *Interpretation of Statutes,* 7th ed, quoted the dictum in *Nokes v. Doncaster Amalgamated Collieries* [1940] AC 1014/1022, explained the rationale for this approach in the following terms:

> ... if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the broader construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

[30] Thus, when there are two mutually exclusive possible interpretations, the interpretation that would best accord with the intention of Parliament in legislating that piece of legislation is to be preferred so that it would promote the true intention of the Legislature. This approach to statutory interpretation has now found its way into the statute book. The Federal Court in *Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram* in construing the meaning of certain words in rr. 3(a), (b)(ii) and 27 of the Legal Profession (Practice and Etiquette) Rules 1978 had referred to the s. 17A of the Interpretation Acts 1948 and 1967, which provides:

> 17A. Regard to be had to the purpose of Act.
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[31] Thus, in accordance with the provisions of s. 17A of the Interpretation Acts, and the high authorities cited above, I have taken the approach to statutory construction that which would best promote the legislative purpose and object underlying s. 8(4) of the LAA specifically and the entire Act in general, as the best approach to resolve this dispute. See: *Panglima Tentera Laut Diraja Malaysia & Ors v. Simathari Somenaidu* [2017] 3 CLJ 129; [2017] MLJU 23, FC.

[32] What then is the legislative purpose in the introduction of s. 8(4) of the LAA in 1983 by Parliament? In anticipation of answering this question, I had earlier in paras. 14 to 19 above set out the background facts leading to the Amendment Bill that brought about the amendment to the LAA to include s. 8(4) and several other provisions in 1984. In order to better understand the legislative intent, I have earlier referred to the Minister's statement when tabling the Amended Bill in Parliament and quoted extensively from the Hansard. The Federal Court in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285; [1994] 3 MLJ 345 has stated that reference Hansard as an aid to statutory interpretation is permissible. The Minister of Lands and Regional Development in tabling the Amendment Bill in Parliament had quite plainly and clearly explained the Government's purpose and intent in moving the Amend Bill to include s. 8(4) to the LAA.

From the Ministerial statement it is evident that the legislative intent and purpose was to overcome the mischief of inordinate delay in completing the acquisition process and payment of the award of compensation, which had lead to injustice to landowners whose lands had been acquired. Such injustice was recognised by the Federal Court in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* (*supra*) where Salleh Abas CJM (as he then was) said:

> The next relevant issue is the injustice caused to the landowner by the delay in holding the inquiry and the making of the award. Because the market value of the land has to be determined as the value prevailing on the date of the declaration - see paragraph 1(1) of the First Schedule to the Act - the effect of the delay is that the landowner has to be awarded on the date of the award the past value as on the date of the declaration without taking into account the increase in the price of the land and the effect of inflation which have occurred in the meantime. Thus the longer the delay in making the award is, the greater would be the injustice to the landowner. In this case the landowner was awarded in 1981 the market price of the land prevailing in 1974.

[33] Thus, the apex court had prior to the enactment of s. 8(4) of the LAA recognised the problem and Parliament had set about to address that mischief by passing this amendment. Lord Denning in *Seaford Court Estates Ltd v. Asher* [1949] 2 KB 481, had given the following time-tested advise to judges in their discharge of the arduous task of statutory interpretation:

> It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. *He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy*, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. (emphasis added)

[34] This approach to statutory interpretation has been termed as the mischief rule approach, which in most cases complements the purposive approach. See the Court of Appeal's application of this rule in *Jerry WA Dusing & Anor v. Majlis Agama Islam Wilayah Persekutuan (MAIWP) & Ors* [2017] 1 CLJ 133; [2017] 1 MLJ 216. There are generally four steps in this approach, namely to answer the following four steps question:

(i) What was the law before the Act?

(ii) What was the mischief and effect for which the law did not provide?

(iii) What remedy the Legislature has resolved and provided to cure the mischief?

(iv) What is the true reason for the remedy?

See: *Devji Keshavji v. Dahibai Bhailal Shah* AIR 1971 Bom 285, 287 and *Krishnan v. Vijayaraghavan* 1977 Ker LT 1013.

[35] Thus, when this approach is taken, the construction of the statute will lead to giving effect to the suppression of the mischief and the advancement of the intended remedy. In this case, the answers to these four step questions are:

(i) before s. 8(4) of the LAA was enacted, there was no time limit within which the Land Administrator was to conclude the inquiry and hand down the award of compensation.

(ii) the mischief that the Legislature sought to overcome was the injustice to landowners brought about by inordinate delay in concluding the acquisition and handing down the award.

(iii) the Legislature resolved to prescribe a time limit of two years from the date of the s. 8(1) declaration to conclude the inquiry and hand down the award.

(iv) the true reason for the remedy is to ensure that compulsory land acquisition is concluded expeditiously such that it is fair to landowners; otherwise the acquisition comes to an end by effluxion of time.

[36] Now, having considered these factors, I find that if the respondents were allowed to revive the lapsed acquisition by re-issuing the s. 8(1) declaration after the expiry of the earlier one, it would definitely not be in consonant with the intent of Parliament to bring about the speedy determination of the inquiry within a period of two years. In such an event, the mischief that the Legislature sought to remedy would not be corrected and it would be a return to the old days of protracted inquiries. If the contention of the learned Federal Counsel were upheld, it would mean that the respondents could keep on re-issuing the declaration in continuation after each expiry and go on *ad infinitum*. This, to my mind, is certainly not the intent of Parliament in enacting s. 8(4) of the LAA.

[37] Salleh Abas CJM (as he then was) in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* (*supra*) pointed out the law envisages that the landowner whose land is acquired is adequately compensated. To this end, the compensation must commensurate with the market value of the land, and such fair market value has to be determined based on the value prevailing on the date of the declaration as provided in para. 1(1) of the First Schedule to the LAA that reads:

> 1(1) For the purposes of this Act the term "market value" where applied to any scheduled land shall mean the market value of such land:
>
> (a) at the date of publication in the *gazette* of the notification under section 4, provided that such notification shall within twelve months from the date thereof be followed by a declaration under section 8 in respect of all or some part of the land in the locality specified; or
>
> (b) in other cases, at the date of the publication in the *gazette* of the declaration made under section 8.

[38] In this case, the market valuation of the land to be acquired would reflect the valuation as at the date of the s. 4 declaration that was published in the *Warta Kerajaan Negeri Melaka vide* Gazette No. 145 dated 31 January 2013. Arena Kencana, as the applicant, would have done a preliminary valuation, when putting in its application in January 2013, for s. 3(3) of the LAA mandates that:

> 3(3) Any application made under paragraph (1)(b) or (c) shall be accompanied by:
>
> ... ...
>
> (c) the preliminary Government valuation report of the land to be acquired; and

[39] The respondents argue that they can revive and continue with the acquisition by the re-issuance of the s. 8(1) declaration. The respondents do not wish to start afresh. This means that Redfield, as the substituted applicant, will not be required to re-submit a fresh current market valuation as required under s. 3(3) of the LAA. Indeed, there is no evidence that the respondents intent to do a fresh market valuation of the land to be acquired. This also means that the first respondent would in all probability be keeping to the market valuation done sometime in 2012/2013 in assessing the compensation to be awarded. A period of four years has lapsed since the acquisition was first started in January 2013. If the respondents are allowed to continue with the acquisition in the manner they have chosen, an award of compensation based on a market valuation done in 2012/2013 may not truly reflect the current market value. Thus, the applicant may not stand to be awarded fair and adequate compensation reflecting the market value of the land as envisaged in para. 1(1) of the First Schedule to the LAA. This, to my mind, is clearly not the intention of the Legislature in introducing s. 8(4) of the LAA to the statute book. In fact, the intent of Parliament was to achieve the exact opposite so that such hardship and injustice to landowners is done away with. See: *Pemunggut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* (*supra*). This, therefore, further fortifies the applicant's position that the respondents should start the acquisition process afresh, so that the applicant as landowner stands to be compensated at market value and is provided all the statutory rights and protection under the law.

[40] In addition to the above, s. 8(5) of the LAA makes it abundantly clear that when the s. 8(1) declaration lapses by effluxion of time pursuant to s. 8(4), the provisions of s. 35(2), (3) and (4) of the LAA would apply with necessary modifications. Section 35(2) of the LAA provides for compensation to be paid to the landowner when the State Authority withdraws from any acquisition under s. 35(1). Now, if the same provisions as regards compensation for withdrawal from the acquisition by the State Authority under s. 35(1) apply to situations where the declaration has lapsed under s. 8(4), then it could only mean one thing and that is in both cases the entire land acquisition process had come to an end. Otherwise, it does not make any sense to allow for compensation to be paid to the landowner in

accordance to s. 35(2), in both cases. The effect of s. 35(2) on a lapsed declaration under s. 8(4) of the LAA was considered by Wan Adnan Ismail J (later PCA) in *Straits Credit Sdn Bhd v. Pentadbir Tanah Daerah, Wilayah Persekutuan Kuala Lumpur* [1994] 2 CLJ 855 and it would be useful for our purpose to quote the relevant passage from the judgment:

> The Act makes no provision as to payment of any compensation in the event of a lapse of declaration under s. 8(4). The effect of a lapse is that all acquisition proceedings in respect of the land in question come to an end. The effect is the same when the State Authority withdraws from the acquisition under s. 35(1) of the Act. Should the consequence be different? In my opinion s. 35 should be given a liberal interpretation. The consequence of a lapse under s. 8(4) should be the same as of a withdrawal under s. 35 of the Act. The rights of landowners in both situations should not be different. If the issue of compensation does not arise in the event of a lapse under s. 8(4), then whenever the State Authority decides not to proceed with any acquisition, the State Authority will almost certainly always allow the declaration to lapse rather than withdraw the acquisition under s. 35(1). In my view s. 35(2) of the Act is also applicable when a declaration for acquisition lapses under s. 8(4).
>
> I therefore granted all the declarations and orders prayed for. I further ordered that the assessment under s. 35(2)(b) be made by the Senior Assistant Registrar on the application of the Applicant.

[41] The learned judge had held that by virtue of the provisions of ss. 8(5) and 35(2) of the LAA, the effect of a lapsed declaration under s. 8(4) is the same as that of a withdrawal by the State Authority under s. 35(1) of the LAA, which means that in both cases the acquisition process comes to a complete end, and the landowner is entitled to compensation. I agree entirely with the interpretation of my learned brother in that case. Compensation under s. 35(2) of the LAA is payable by the State Authority to the landowner only when the acquisition process has come to a complete end. It does not make sense for compensation to be paid for a lapsed acquisition, and thereafter allow it be revived by re-issuing a fresh s. 8(1) declaration. Hence, there cannot be any right on the part of the respondents to re-issue the s. 8(4) declaration to revive and continue with the acquisition process. If the State Authority intends to still acquire the land after the lapse of the s. 8(1) declaration, they would have to start all over again by conforming onwards from the requirements of s. 3 of the LAA.

[42] Another factor that has tilted the decision in favour of the applicant is this. The rules of statutory interpretation dictate that in interpreting a particular provision, the statute must be read as a whole and all parts must be taken together as an aid to interpretation. Raus Shariff PCA in delivering the unanimous decision of the Federal Court in *Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal* [2016] 4 CLJ 12; [2016] MLJU 40 reiterated this principle in the following words:

> ... in order to appreciate the real intent and object of the law, it is crucial to look at the whole scheme of the Act.

[43] Similarly, in an earlier Federal Court decision delivered by Augustine Paul FCJ in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177, the learned judge quoted the judgment of Higgins J in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* [1920] 28 CLR 129 and held that:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that **intention has to be found by an examination of the language used in the statute as a whole**. (emphasis added)

[44] Keeping this principle in mind, I turn to examine the legislative scheme of the LAA as a whole. Now, in any land acquisition process under the LAA, there is stator requirement to issue two gazette notifications, the first is the declaration under s. 4(1) in Form A and the second is the declaration under s. 8(1) in Form D.

[45] Section 4 of the LAA provides that:

> (1) Whenever the State Authority is satisfied that any land in any locality in the State is likely to be needed for any of the purposes referred to in section 3 a notification in Form A shall be published in the *gazette*.
>
> (2) The Land Administrator shall give public notice of any notification published under subsection (1) in the manner prescribed by section 52.
>
> (3) A notification under subsection (1) shall lapse in so far as it relates to any land or part of any land in respect of which there is not published in the *gazette* within twelve months from the date of publication of such notification a declaration under subsection 8(1).
>
> (4) Notwithstanding subsection (3), it shall be lawful for the State Authority to publish a fresh notification under subsection 4(1) in respect of the land or part of the land in relation to which the notification had lapsed if the State Authority is satisfied that such land or such part of the land is likely to be needed for any of the purposes referred to in section 3.

[46] Now, s. 4(3) provides that any gazette notification done under s. 4(1) shall lapse if there is not published in the *gazette* within 12 months from the date of publication of such notification the subsequent declaration under s. 8(1). However, notwithstanding the provisions in s. 4(3), if the State Authority is satisfied that such land or such part of the land is still likely to be needed for any of the purposes referred to in s. 3, then sub-s. 4(4) specifically provides that when the s. 4(1) declaration has lapsed it shall be lawful for the State Authority to issue and publish a fresh notification under sub-s. 4(1) in respect of the land or part of the land in relation to which the notification had lapsed and continue therefrom. Thus, in respect of the gazette notification/declaration under s. 4(1), the law specifically provides and makes it lawful for the re-issuance of the notification once it lapses; but in respect of a lapsed declaration under s. 8(1) there is no similar provision. If the Legislature had specifically provided for the re-issuance of one lapsed

notification and not the other, then it must be taken that the Legislature had intended it be so, in that once a declaration under s. 8(1) has lapsed pursuant to the provisions s. 8(4), it cannot be reissued and the land acquisition process cannot be continued therefrom. Thus, I am of the opinion that to do so, as was done in this case, is contrary to law.

[47] Hence, when the overall scheme of the legislation is considered, it is quite obvious that once the declaration under s. 8(1) has lapsed by passage of time as provided in s. 8(4), the entire acquisition proceedings come to an end. If the State Authority is still desirous of acquiring the land, it would have to start the process afresh right from the beginning, ie, from s. 3 of the LAA onwards.

[48] I will now move on to the issue of *res judicata* raised by the learned Federal Counsel appearing for the respondents. The respondents contend that the present application is grounded on issues similar to those raised in the first OS, which was heard on its merit and dismissed by Abdul Karim Abdul Jalil J (as he then was). The learned Federal Counsel further submits that the Court of Appeal has struck out the applicant's appeal of that decision and as such the doctrine of *res judicata* prohibits the applicant from re-litigating these issues afresh. In support of this contention, the learned Federal Counsel has referred to several cases, including *Joseph Paulus Lantip & Ors v. Unilever PLC* [2012] 7 CLJ 693, FC; *Chemfert Sdn Bhd & Anor v. Lim Hua* [2010] 7 CLJ 491, CA.

[49] Learned counsel for the applicant submits that while the principle in the cases cited is correct, it is not applicable in our present case for the following reasons:

(i) Firstly, this is a new acquisition with a different acquisition number and it has to be looked at afresh. Particularly, the issue of the lawfulness of the revived acquisition proceedings by re-issuing the declaration under s. 8(1) and republishing it in the *gazette* could not have been raised in the earlier case, as this is a matter that arises post disposal of the first OS.

(ii) Secondly, the issue of *res judicata* should not be raised by learned counsel for the respondents as it would be unconscionable and cause injustice to the applicant. Learned counsel for the applicant argues that the issues raised in the earlier case were not fully heard and considered on its merit by the Court of Appeal. Instead, the appeal was struck out based on the representations made by the respondents' counsel at the Court of Appeal. These representations of the learned Senior Federal Counsel are found in paras. 7(i), (ii), (iii) of the affidavit in reply of the applicant, more particularly in para. 7(ii) wherein the deponent avers, that:

> Saya juga diberitahu oleh peguam saya, peguamcara peguam persekutuan, semasa perbicaraan di Mahkamah Rayuan pada 22.04.2015 telah memberitahu Mahkamah Rayuan bahawa gazette pengambilan tanah No. 179, BTH 14.02.2013 telah luput dan rayuan tersebut adalah akademik. Mahkamah Rayuan telah

> menolak rayuan kami atas dasar rayuan tersebut adalah akademik dan tanah tersebut yang ingin diambil telah dikembalikan kepada pemohon. Saya juga ingin memberitahu Mahkamah Yang mulia ini bahawa tidak ada pada bila-bila masa, Responden-Responden memberitahu kepada Mahkamah Rayuan bahawa mereka ingin meneruskan dengan pengambilan tanah.

[50] This positive averment was not refuted or challenged by the respondents. It is trite law that if there is no reply, this factual averment is deemed admitted. See: *Ng Hee Thong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281 CA; *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45; [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82; [1988] 3 MLJ 332.

[51] Learned counsel for the applicant further submits that the Court of Appeal did not wish to hear the appeal after the learned Senior Federal Counsel had informed the court that the appeal is rendered academic, on the grounds that the first acquisition had lapsed and that the land had reverted back to the applicant. And for this reason, the Court of Appeal did not proceed to hear the appeal, and instead struck out the appeal. The respondents did not inform the Court of Appeal through their counsel that they intended to nevertheless continue with the acquisition by re-issuing the s. 8(1) declaration. Counsel for the applicant states that had he been informed of the respondents' intention to re-issue the declaration under s. 8(1), he would have insisted on proceeding with the appeal.

[52] Based on this unrebutted evidence, I accept the applicant's contention that the appeal at Court of Appeal did not proceed to hear the appeal because of the aforesaid representation of the respondents' counsel. Hence, the applicant was deprived of their legitimate right to argue the appeal and have the issues raised therein decided with some degree of finality. In the circumstance, I find that it would be unconscionable to apply the doctrine of *res judicata*. In this regard, I am guided by the pronouncement of Gopal Sri Ram JCA (as he then was) in *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346 to the following effect:

> Pausing for a moment, I think that it is essential to bear in mind that Wigram VC spoke these words in the Court of Chancery, and that the court he referred to was that court of which he was the Vice Chancellor at the time. I make mention of these matters in order to demonstrate that the doctrine of *res judicata* has its roots in equity and hence retains its discretionary nature that is common to all equitable doctrines.
>
> Now, there is a dimension to the doctrine of *res judicata* that is not always appreciated. It is this. **Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result**. And there is respectable authority in support of the view I have just expressed.
>
> In *Carl-Zeiss Stiftung v. Rayner and Keeler Ltd & Ors (No 2)* [1966] 2 All ER 532 at p 573, Lord Upjohn said:

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case ([1938] 4 All ER 747 at p 755; [1939] AC 1 at p 21)). *All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind*. (emphasis added)

[53] The same principle was repeated and applied by Gopal Sri Ram JCA in the Court of Appeal case of *Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors* [2006] 1 CLJ 41; [2006] 1 MLJ 193 at p. 53 (CLJ); p. 201 (MLJ) where the learned judge said:

> One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss* case [1966] 2 All ER 536 at p 573; [1967] 1 AC 853 at p. 947
>
> In a later passage, I find Lord Keith saying:
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> > Estoppel *per rem judicatam*, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the respondents permission to reopen the disputed issue.
>
> These views were very recently reaffirmed by the House of Lords in *Johnson v. Gore Wood & Co* [2001] 1 All ER 481. See in particular the speech of Lord Bingham of Cornhill, at pp. 8-10 of the transcript.
>
> On the authorities discussed thus far, the principle comes to this. Whether *res judicata* in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies.
>
> So the question that is to be asked here is this: if the second suit is permitted to proceed will it favour an abuse of process? In my judgment it will not. Indeed, I am satisfied that abuse of process would be favoured rather than prevented by refusing the appellant permission to reopen the issue. I will explain why.

[54] In the more recent case of *Tanalachimy Thoraisamy & Ors v. Jayapalasingam Kandiah Yong Yoon Shing & Anor* [2014] 1 LNS 340; [2014] 4 MLJ 85, Mohamad Ariff JCA speaking for the Court of Appeal reiterated the principle:

> In modern terms, it is against public policy, and oppressive to the individual, to re-agitate disputes which have been litigated to a conclusion.' (Spenser Bower, Turner & Handley, *Res Judicata*, p 4) There could be situations when an overly rigid adherence to the doctrine can

lead to oppression to a party, in which event it may be inequitable to apply it unquestioningly. We have been referred to the decision of the Court of Appeal in *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346, and the following passage in the judgment ...

[55] And in the very recent Court of Appeal case of *Mat Shuhaimi Shafiei v. Kerajaan Malaysia* [2017] 1 CLJ 404; [2017] 1 MLJ 436 Varghese George JCA in delivering the judgment of the court held that:

It was trite that the doctrine of *res judicata* is not an inflexible rule; a court could still decline to apply it where to do so would lead to an unjust result. The doctrine, whether in its narrow or broader sense, has its roots in equity and hence retained its discretionary nature, namely to work justice and not injustice. It was still open to the courts to recognise that in special circumstances an inflexible application of that doctrine or of any estoppel may have the opposite result. It was '… merely equity in action in the procedural arena' to quote Gopal Sri Ram JCA (as His Lordship then was) in *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321.

[56] Taking guidance from these binding authorities, I accept the submissions of learned counsel for the applicant that the principles of *res judicata* and/or estoppel being equitable in nature, should not be applied in this case, as the issues raised in the earlier case have not been determined with finality by the Court of Appeal because of the respondents' counsel's failure to make full and frank disclosure that they intended to proceed with the acquisition by re-issuing the s. 8(1) declaration. In the circumstances, it would be inequitable to allow the respondents to rely on *res judicata* and/or issue estoppel, as the application of these principles would lead to an unjust result and will not accord with good conscience. As such, I find that the doctrine of *res judicata* and/or issue estoppel is inapplicable to bar the applicant from raising issues similar to those raised in the first OS.

[57] Of the several issues raised by the applicant in the first OS and now in this suit, one issue stands out as being meritorious of consideration. In this case, the party applying for the land to be acquired was originally Arena Kencana. Arena Kencana made the application on 3 January 2012 to the first respondent under s. 3(1) of the LAA. The first respondent had in accordance to s. 3(4) of the LAA transmitted that application and the accompanying documents to the State Economic Planning Unit, UPENM. Section 3A(1) of the LAA provides that:

(1) The State Economic Planning Unit, or the Committee for the Federal Territory of Kuala Lumpur, as the case may be, shall consider the application referred to in subsection 3(4) on the following aspects:

(a) public interest;

(b) the capacity and capability of the applicant to carry out the purpose for which the land is to be acquired;

(c) the feasibility of the project; and

(d) the development approval granted to the registered proprietor.

[58] Therefore, pursuant to s. 3A(1)(b) and (c) of the LAA, UPENM is mandated to consider the financial capacity and overall capability of the applicant to carry out the purpose for which the land is to be acquired, as well as to consider the feasibility of the project before forwarding the application to the State Authority for its approval.

[59] However, there is uncontroverted evidence showing that at the date on which Arena Kencana applied for the land to be acquired, it was already in financial distress, and had in fact applied for protection under s. 176 of the Companies Act 1965, and receivers and managers had been appointed by a secured creditor acting under a debenture. In fact, as a result of Arena Kencana's financial predicament, construction had ceased at site and the project was abandoned. On 4 January 2012, ie, a day after the application was made to the first respondent for the acquisition of the land, the Kuala Lumpur High Court had, upon the application of Arena Kencana, sanctioned a proposed scheme of arrangement under s. 176 of the Companies Act 1965 for Arena Kencana's lands situated adjacent to the land to be sold and transferred to Redfield Consortium Sdn Bhd ("Redfield"). Presently, Redfield is the registered owner of the adjacent lands and Redfield is now undertaking the project development. So obviously Arena Kencana did not have the financial means or capacity to undertake the project development on the adjacent lands when it made the application on 3 January 2012 for the acquisition of the land.

[60] Section 3A of the LAA that mandates scrutiny by the UPENM was introduced *vide* the Land Acquisition (Amendment) Bill 1997. And when tabling the Bill for its second reading in Parliament, the Parliamentary Secretary to the relevant Ministry had said that the purpose of the amendment is to ensure that only genuine parties with the financial means and capacity would be allowed to apply for the acquisition of privately owned land for development. And to quote from the Hansard, this is what the Parliamentary Secretary said:

> Tuan Yang di-Pertua, objektif kedua iaitu untuk memperjelaskan lagi cara-cara pelaksanaan seksyen 3(b) dan (c) supaya ianya seragam, lebih telus, rasional, bertanggungjawab dan boleh melindungi kepentingan tuan tanah secara total ada diterangkan di dalam Fasal 4 rang undang-undang ini. Memandangkan Unit Perancang Ekonomi Negeri merupakan satu institusi yang mempunyai kepakaran dan pegawai dalam bidang yang diperlukan, maka ianya dipertanggungjawabkan untuk meneliti permohonan yang diterima daripada Pentadbir Tanah.
>
> Bagi permohonan di Wilayah Persekutuan Kuala Lumpur, Pentadbir Tanah akan mengemukakan permohonan tersebut kepada Jawatankuasa Khas Pengambilan Tanah Wilayah Persekutuan Kuala Lumpur. UPEN atau Jawatankuasa Khas Wilayah Persekutuan Kuala Lumpur, setelah menerima permohonan, perlu meneliti dan menyemak beberapa perkara seperti:

(a) kepentingan awam;

(b) keupayaan dan kemampuan pemohon;

(c) daya maju projek; dan

(d) kelulusan pembangunan yang dikeluarkan kepada pemilik tanah berdaftar.

[61] Therefore, it is the Legislature's intention to ensure that any acquisition of private land for the benefit of a non-state party is done only when the applicant for the land is able to demonstrate its financial capacity and ability to develop the land and that it would be in the public's interest to acquire the land. However, when the facts of the case are examined closely, it is abundantly clear that this intended purpose of the Legislature had not been given effect to by the respondents. The applicant in this case, Arena Kencana, a company in financial distress and under s. 176 of the CA protection order, was allowed to apply for the applicant's land to be compulsorily acquired, only to later sell off the project, including the land to be acquired to a third party, Redfield, whose financial means or capacity to undertake and complete the project is not known. Such practices, if condoned by this court, would lead to a total disregard of the legislation, particularly s. 3A of the LAA, and the purpose for which it was enacted. Obviously, the respondents' action to subsequently change the name of the acquiring party to Redfield and continue the acquisition therefrom is in violation of the law. The respondents have substituted the applicant for the land without the scrutiny mandated by s. 3A of the LAA. If Redfield is allowed to substitute Arena Kencana as the applicant in this manner, then it would defeat the legislative intent in enacting s. 3A of the LAA and affording the landowners such as the applicant herein legal protection against abuse of the land acquisition process by parties who apply to acquire privately owned land with intent to pass on the land to a third party for a profit.

[62] Thus, the decision of the respondents to substitute Redfield for Arena Kencana is in my opinion illegal, unreasonable and irrational, in which case the decision is susceptible to curial intervention by this court. If Redfield was now the applicant, then the first respondent should demand a fresh application from Redfield for the acquisition of the land in compliance of the requirements under s. 3 and 3A of the LAA and such other relevant provisions therein, and commence the acquisition of the land afresh. Without such scrutiny as mandated by the statute, there is no guarantee that Redfield too would not abandon the project, and leave the acquired land unproductive and of no use to anyone.

[63] The applicant has stated that the land to be acquired is being tenanted and used for agricultural cultivation. If the land is acquired and left abandoned by an applicant who does not have the capacity to develop it, good cultivable land would become unproductive wasteland. In tabling the amendment to the LAA in 1998, the Parliamentary Secretary had stated that

it was the intention of the Government to ensure that the country's scarce land resource is put to optimal economic use, and that is why the added scrutiny in s. 3A was introduced. Thus, it is in the greater public interest to ensure that there is strict compliance of the requirements of the LAA when land is to be acquired so that the overall letter and spirit of the legislation is given effect to.

[64] It is trite law that the High Court when hearing an application for *certiorari* does not sit in its appellate jurisdiction but merely performs its supervisory jurisdiction. See *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227; [1998] 1 MLJ 305 CA; *Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9 SC.

[65] Further, in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, FC; and *Booi Kim Lee v. YB Menteri Sumber Manusia Malaysia & Anor* [1999] 4 CLJ 121; [1999] 3 MLJ 515, HC, the courts adopted the *dicta* of Lord Diplock in *Council of Civil Services Unions & Ors v. Minister of Civil Service* [1985] 1 AC 374 and held that the courts can by way of judicial review interfere with an act of an executive authority in generally three different circumstances, namely:

(i) Illegality – that is when the authority concerned has been guilty of an error of law in its action, ie, purporting to exercise a power it does not have and/or acting *ultra vires* its powers. This allows the courts to scrutinise such decisions not only for process, but also for substance. See *Syed Mubarak Syed Ahmad v. Majlis Peguam Malaysia* [2000] 3 CLJ 659; [2000] 3 AMR 3048; [2000] 4 MLJ 167; *Lam Eng Rubber Factory (M) Sdn Bhd v. Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor* [2005] 2 CLJ 157; [2005] 2 AMR 471.

(ii) Irrationality – that is when the authority exercises its power in such an unreasonable manner that the decision is so outrageous that it defies logic and that a person having put his mind to the question could not have arrived at such a decision, ie, the *Wednesbury* unreasonableness principle – see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] KB 223.

(iii) Procedural impropriety – that is the authority's failure to observe procedural rules expressly laid down in the legislative instrument by which its jurisdiction is conferred, the breach of which may or may not involve denial of natural justice. See *M Sentivelu R Marimuthu v. Public Services Commission Malaysia & Anor* [2005] 3 CLJ 778; [2005] 5 MLJ 393.

[66] Lord Diplock mentioned 'proportionality' as a possible fourth ground of review and the Federal Court in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 FC said that such a principle is recognised as a general principle of English law, and when

applied, it enables the court to review an impugned decision for substance as well as process. Indeed, in industrial and employment law, the principle of proportionality is well-recognised and has been a ground for judicial review. See *Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor* [2014] 8 CLJ 821 FC.

[67] In applying the law to the uncontroverted facts of the case, for reasons stated above, I find that the decision of the respondents to reissue and republish the s. 8(1) declaration suffers from the infirmities of illegality and procedural impropriety that warrants curial intervention.

[68] Wherefore, I make the following orders:

(i) a declaratory order is hereby granted to the effect that the declaration under s. 8(1) of the LAA dated 22 October 2015 and 5 October 2015 notifying the public of the State Authority's intention to acquire a portion of the land measuring 0.9949 hectare or 2.458 acres from Lot No. 383 Grant No. 22816, Mukim Tanjung Minyak, Daerah Melaka Tengah, Melaka, published in the Government Gazette No. 546 dated 22 October 2015 and Government Gazette No. 586 dated 5 October 2015 respectively are void in law;

(ii) the applicant is granted an order of *certiorari* to bring into this court for the purposes of quashing the decision of the respondents dated 22 October 2015 and 5 October 2015 approving the acquisition of a portion of the land measuring 0.9949 hectare or 2.458 acres from Lot No. 383 Grant No. 22816, Mukim Tanjung Minyak, Daerah Melaka Tengah, Melaka, published in the Government Gazette No. 546 and 586 dated 22 October 2015 and 5 October 2015 respectively, and the aforesaid decision is hereby quashed;

(iii) that damages be assessed by the Senior Assistant Registrar; and

(iv) cost of this judicial review be borne and paid by the respondents.